Supreme Court, U. S.
FILED
JUL 24 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-759

UNITED STATES OF AMERICA, *Petitioner*

v.

THOMAS W. MOORE, JR.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
RAYMOND W. BERGAN
1000 Hill Building
Washington, D. C. 20006
Counsel for Respondent

July 1975

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

12237-7-75

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BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the court of appeals is reported at 505 F.2d 426.

JURISDICTION

The judgment of the court of appeals was entered on October 18, 1974. On November 14, 1974, the Chief Justice extended the government's time for filing a petition for a writ of certiorari to and including December 17, 1974. The petition was filed on the latter date and granted on February 18, 1975 (App. 142). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a physician who is registered with the Bureau of Narcotics and Dangerous Drugs ("BNDD") and whose registration authorizes him to prescribe methadone may be prosecuted under 21 U.S.C. § 841 for prescribing methadone to his patients.

Subsidiary questions encompassed within the main question are:

(a) Whether a violation by such a physician of Section 306.04 of Regulations promulgated pursuant to the Controlled Substance Act (21 C.F.R. § 306.04) may be prosecuted under Section 841 of the Act.

(b) Whether, in the circumstances of this case, Section 306.04 was, in fact, violated.

STATUTES AND REGULATION INVOLVED

The pertinent provisions of the Controlled Substances Act (Pub. L. 91-513, 84 Stat. 1242, 21 U.S.C. 801, et seq.), relevant sections of other statutes and the pertinent regulation, 21 C.F.R. 306.04 (1973 ed.), are set forth in the appendix to the government's brief. They are reproduced, where appropriate, throughout this brief.

STATEMENT

The respondent, Dr. Thomas W. Moore, then a practicing physician in the District of Columbia, was indicted on June 27, 1972 on 639 counts of violating 21 U.S.C. § 841(a).[1] App. 3-29. The indictment alleged

[1] "(a) Except as authorized by this subchapter it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance."

the unlawful distribution of a controlled substance, *i.e.*, methadone, to named recipients on specific dates. He was tried in October 1972 on an indictment which contained 40 of the original counts, the remaining counts having been severed. 505 F.2d, at 428, fn. 7. He was convicted on 22 of those counts, eight of which were said to involve persons under 18. Pursuant to 21 U.S.C. § 845, distribution to minors may carry a doubled sentence.[2]

After conviction, and prior to the date set for sentence, Dr. Moore left the country and travelled first to Canada and thence to Morocco, Algeria, Switzerland and, finally, to Denmark. He returned voluntarily[3] and was arrested immediately upon his return. The trial court imposed concurrent sentences of five to fifteen years on 14 of the 22 counts. On the other eight counts, said to relate to minors, the trial court imposed sentences of ten to thirty years, concurrent among themselves but consecutive to the sentences imposed on the other 14 counts. In addition, fines totalling $150,000 were imposed. The remaining counts were dismissed. App. 134. He thus faces a 15 to 45 year jail sentence and a massive fine. 505 F.2d, at 429;

[2] "(a) Any person at least eighteen years of age who violates section 841(a)(1) of this title by distributing a controlled substance to a person under twenty-one years of age is (except as provided in subsection (b) of this section) punishable by (1) a term of imprisonment, or a fine, or both, up to twice that authorized by section 841(b) of this title, and (2) at least twice any special parole term authorized by section 841(b) of this title, for a first offense involving the same controlled substance and schedule."

[3] Denmark then had no extradition treaty with the United States. *Treaties in Force,* U.S. Department of State (1974), pp. 66-70.

App. 134.[4] He was ordered jailed immediately, *id.*, and has been continually incarcerated since that time.[5]

Respondent's view of the manner in which the statute in question must be interpreted, and the inapplicability of certain regulations promulgated thereunder, does not require a lengthy summary of the evidence introduced at trial. The following facts, which the jury could have found, were conceded in the court of appeals, 505 F.2d, at 427-428, fn. 6, and are similarly conceded here. With respect to patients named in the indictment, as well as others during the indictment period, including government agents posing as patients, Dr. Moore conducted himself more or less as follows:

> 1. He did not take all possible precaution to assure himself that the patients for whom he was prescribing methadone were in fact narcotic addicts. Some, in fact, were not.
>
> 2. He did not take all possible precaution to ascertain that the methadone he was prescribing was, in fact, being consumed by the patients for whom he prescribed it. In some instances they delivered that methadone to others.

[4] In addition, his license to practice medicine was revoked pursuant to the provisions of D.C. Code § 2-131. That statute authorizes such revocation upon the conviction "of any felony."

[5] The court of appeals denied a motion seeking the Respondent's release from custody by an order dated December 13, 1974. Five days later the order was amended to state that "there are no conditions of release under 18 U.S.C. § 3148 which 'will reasonably assure that the [appellant] will not flee.'" This Court denied Respondent's application for release on December 23, 1974. A-446.

> 3. He was careless in record-keeping, failing in some instances to record the quantity of methadone he had prescribed for his patient.
>
> 4. He prescribed methadone in quantities larger than the government's medical witnesses thought proper for detoxification, sometimes in whatever quantities the patients requested.
>
> 5. His fees were graduated not in accord with the medical services rendered but in accord with the quantity of methadone prescribed.[6]

Dr. Moore's trial testimony was that his purpose in prescribing methadone for his patients was to cure them of drug addiction. His theory, the inspiration for which he attributed chiefly to the experience of a British practitioner about which he had read in the medical literature, was that cure depended upon methadone in such large quantities, varying from case to case, as might be required to achieve in the patient two conditions: (1) a physical condition of "blockade";[7] and (2) a psychological condition of strong desire for drug detoxification. According to that theory, if only enough methadone to achieve the first condition were taken, the subsequent detoxification by

[6] As for his fee schedule, Dr. Moore's explanation at trial was that his purpose in charging more for prescriptions of higher quantities was to make it uneconomical for his patients to peddle their methadone in the black market and to make sure they consumed it themselves.

[7] "Blockade," according to an expert called by the defense, "means that you stuff a patient up with enough methadone so that the heroin he takes doesn't have any place to go but straight in and out. . . . I mean, whatever heroin did for the brain, it no longer does it at a certain X-level of methadone." Tr., 10/18/72, pp. 554-55.

gradual diminutions of dosage would produce only temporary remission of the addiction. To achieve cure, however, the methadone dosage must be continued beyond "blockade," until the second condition has been achieved—in which the counter-craving for detoxification substitutes for the drug-craving. It was upon this theory that Dr. Moore justified his practice of allowing his patients' desire to determine the quantity of methadone he prescribed for them.

Respondent's view is that neither the statute in question nor the regulations in effect at the time of the Respondent's conduct made his conduct criminal. As a result thereof, an acquittal is required. This is the result reached by the court below.[8]

SUMMARY OF ARGUMENT

The statute allegedly violated by Dr. Moore, 21 U.S.C. § 841, makes it a felony for a person not "au-

[8] Even should this Court disagree with the statutory and regulatory analysis contained in the opinion of the court below, the case must be remanded to that court for consideration of points there raised but not reached, including, *inter alia*, whether the doubled sentence was proper.

Even the dissenting judge in the court below recognized that, since the minority status of the eight persons named in the counts as to which the sentence was doubled was neither alleged (as in *United States* v. *Romero*, 249 F.2d 371, 372 (2d Cir. 1957)) nor proven, nor was a special verdict had thereon, the increased sentences called for by 21 U.S.C. § 845 were improperly imposed. 505 F.2d, at 458. This conclusion is compelled by *Jordan* v. *United States District Court for the District of Columbia*, 233 F.2d 362 (D.C. Cir. 1956). Unlike the dissenting judge, however, who would not disturb the consecutive nature of the sentences, the Respondent's view is that not only may such increased sentences not be imposed, but, by the same token, the sentences on those counts could not properly be made consecutive to the sentences imposed on the other counts. The prevailing opinion did not reach the issue of sentencing.

thorized by this subchapter", 21 U.S.C. §§ 801-904, to dispense methadone. The statutory scheme, with respect to "authorized" persons (*i.e.*, manufacturers, wholesalers, physicians and pharmacists), is to require them to register annually with the Department of Justice and to submit to a system of administrative control and regulation, 21 U.S.C. §§ 821 *et seq.* The penal sanctions for misconduct by such registrants are those provided in Sections 842 and 843. By contrast, the severe penal sanctions of Section 841 are reserved for those *unauthorized* persons who deal in narcotics outside the regulatory system.

The government, although conceding that Dr. Moore was registered with the Department of Justice to prescribe methadone during the indictment period, successfully contended that he was nevertheless amenable to prosecution under Section 841, because he had violated some aspects of Section 306.04(a) and (c) of the regulations promulgated by the Attorney General under the statute. However, a violation of the regulation cannot be prosecuted as a crime under Section 841 because: (1) although the statute authorizes regulations to be promulgated, 21 U.S.C. §§ 821, 871(b), it does not apply any criminal sanctions to their violation; and (2) if any statutory sanctions were applicable to a violation of the regulation here involved, it would be the lesser sanction of Section 842, rather than the harsh penalties of Section 841.

Moreover, the government proved no violation of the regulation, so that, whatever the government's theory, the trial court should have granted acquittal on all counts.

ARGUMENT

The Statute in Question Does No. Proscribe the Respondent's Conduct

21 U.S.C. § 841 provides, in pertinent part:

> "Except as authorized by this sub-chapter, it shall be unlawful for any person . . .
>
> 1) to . . . distribute . . . a controlled substance; . . . ."

That is precisely what each count of the Indictment charged—that "Thomas W. Moore, Jr. . . . distribute[d] . . . a controlled substance [to certain named persons] . . . ". App. 3, *et seq.* The fatal flaw in the government's case is found in the provisions of 21 U.S.C. § 822(b).[9] That section provides, in pertinent part:

> "Persons registered by the Attorney General . . . to . . . dispense controlled substances are authorized to . . . dispense such substances . . . ."

[9] "Sec. 822.

> "(a) Every person who manufactures, distributes, or dispenses any controlled substance or who proposes to engage in the manufacture, distribution, or dispensing of any controlled substance, shall obtain annually a registration issued by the Attorney General in accordance with the rules and regulations promulgated by him.
>
> "(b) Persons registered by the Attorney General under this subchapter to manufacture, distribute, or dispense controlled substances are authorized to possess, manufacture, distribute, or dispense such substances (including any such activity in the conduct of research) to the extent authorized by their registration and in conformity with the other provisions of this subchapter."

Subsequent subsections provide exceptions to the registration requirements (Section 822(c)), provide for waiver of such requirements (Section 822(d)), require separate registration for each establishment (Section 822(e)) and authorize inspections (Section 822(f)).

Dr. Moore was registered by the Attorney General, a fact which was, and is, conceded by the government. App. 36; Pet. Br., p. 2. In a statement to the trial court, the Assistant United States Attorney presenting the case made the following concession:

> "He still retained during the time of the dates in the indictment until the present date his registration with BNDD authorizing him to give out prescriptions." App. 36.

Dr. Moore had, therefore, been congressionally exempted from felony prosecution under Section 841.

This result does not arise from a congressional oversight. It is part of a carefully devised statutory scheme which purposefully divided the drug universe into those registered (and, thus approved) to handle narcotic substances and those not registered and which dealt differently with each group.

The House Committee on Interstate and Foreign Commerce, in reporting out the bill which became the Controlled Substances Act, began its analysis of the legislation by pointing out the divergence of treatment of those authorized to deal in narcotics and those not so authorized:

> "The bill provides for control by the Justice Department of problems related to drug abuse through registration of manufacturers, wholesalers, retailers, and all others in the legitimate distribution chain, and makes transactions outside the legitimate distribution chain illegal." House Report No. 91-1444. 91st Cong., 2d Sess., Sept. 10, 1970, U.S. Code Cong. and Adm. News (1970), p. 4569.

Thus, with regard to those recognized as having a legitimate function to perform in dealing with narcotics,

the manufacturer, the retailer, the physician, etc., the intent of Congress was to subject them to administrative regulation and control. The penal sanctions applicable to misconduct by such "authorized" persons within the system of administrative regulation and control were specified in 21 U.S.C. §§ 842 and 843.[10] The use of Section 841's more severe penal sanctions was reserved for *unauthorized* persons—those who dealt in narcotics "outside the legitimate distribution chain . . . ".

To effectuate its intent in respect of persons in the "legitimate distribution chain", Congress provided in Section 822(a) that they must register annually with the Department of Justice; and, in Section 822(b), that, having so registered, they were "authorized" to deal with narcotics to the extent of their registration. To effectuate the system of administrative controls over registered doctors, Congress authorized the Attorney General to conduct inspections of their offices. 21 U.S.C. § 822(f). The registered doctor, whose reg-

[10] The text of Sections 842 and 843 is found in Pet. Br., 19a-23a. In short, Section 842 makes it unlawful for any person who is a registrant to distribute a controlled substance without a prescription, to distribute a controlled substance "not authorized by his registration", to distribute such a substance improperly labelled or on which the label has been obscured, to fail to keep records and make reports when required, to refuse entry into his premises. The basic penalty is a $25,000 civil penalty, Section 842(c)(1), with a one year prison sentence for violations "committed knowingly", Section 842(c)(2)(A), and two years and $50,000 for a second offender. Section 842(c)(2)(B).

Similarly, Section 843 proscribes one "who is a registrant" from distributing a controlled substance other than by an approved order form, from using a fictitious or revoked "registration number", from acquiring registration by fraud or misrepresentation, from making false reports. The basic penalty is four years and $30,000. Section 843(c).

istration was granted in the first instance on a finding that he possessed a medical license authorizing him to dispense narcotic drugs (see 21 U.S.C. § 823(f)), thus operates under the vigilant eye of the Bureau of Narcotics and Dangerous Drugs. The doctor knows that any significant misconduct the Bureau detects may trigger a revocation of his license to practice medicine. In this regard, the recently enacted Narcotic Addict Treatment Act of 1974 ("NATA"), Pub. Law 93-281, has significantly enhanced the government's ability to deregister or to suspend the registration of violators. Section 4 of NATA reads:

> "Sec. 4. (a) Section 304(a) of the Controlled Substances Act (21 U.S.C. 824(a)) is amended by adding after and below paragraph (3) the following: 'A registration pursuant to section 303(g) to dispense a narcotic drug for maintenance treatment or detoxification treatment may be suspended or revoked by the Attorney General upon a finding that the registrant has failed to comply with any standard referred to in section 303(g).'
>
> (b) Section 304(d) of such Act is amended (1) by inserting after the first sentence the following: 'A failure to comply with a standard referred to in section 3003(g) may be treated under this subsection as grounds for immediate suspension of a registration granted under such section.'; and (2) by striking out 'Such suspension' and inserting in lieu thereof 'A suspension under this subsection'."

By contrast, as noted by the court of appeals, Section 841, the section under which Dr. Moore was prosecuted, does not speak of registrants. 505 F.2d, at 430. In deals more firmly with those outside "the legitimate distribution chain"—the "pusher". As concluded by the court of appeals, this statutory outline "strongly

suggests that Congress intended to deal with registrants through a system of administrative controls", *id.*, relying on less severe penalty provisions and deregistration to enforce such controls.

This does not mean that persons so authorized are immune from control or punishment. Administratively, they are subject to the provisions of 21 U.S.C. § 824, which provides for deregistration following which, if their conduct continued, they would be subject to prosecution under Section 841. Moreover, they are subject to the not insubstantial civil and criminal penalties contained in Sections 842 and 843;[11] but not, so long as their registration remained intact, to the more substantial penalties in Section 841.

Violation of Section 306.04 of the Regulations Promulgated by the Attorney General Cannot Trigger Prosecution Under Section 841 of the Statute.

Notwithstanding the foregoing demonstration that Dr. Moore, as an "authorized" person, could not be prosecuted under Section 841, but must be dealt with, if at all, under the administrative provisions of the Act or under those penal provisions which specifically apply to misconduct within the administrative system (Sections 842, 843), the government saw fit to prosecute under Section 841 and, in so doing, led the trial court into error.

Before trial, at the request of the court, the prosecution made a statement of its theory of the case, as to which the court, with the prosecution's assent, declared:

> "I will take that statement which you made, Mr. Alto [Assistant United States Attorney], in the nature of a Bill of Particulars and limit your proof accordingly, and it will be of notice to Mr. Brown [defense counsel]." App. 37.

[11] See fn. 10, *supra*.

The prosecutor's statement was:

> "Of course, we have the Controlled Substance Act statute dealing with these regulations. We have exceptions within that statute as it applies to particular scientists. One of the scientists is, of course, a medical doctor, who can, if he is registered with the appropriate federal agency, dispense the controlled drugs within the course of his professional practice.
>
> The statute also provides that the Attorney General of the United States has the authority to promulgate rules and regulations governing these registrations.
>
> * * *
>
> [Dr. Moore] still retained during the time of the dates in the indictment until the present date his registration with BNDD authorizing him to give out prescriptions.
>
> Now, with respect to the regulation that governs the registration or scope of the registration that he had, I refer your Honor to the Attorney General's rules and regulations cited in the Federal Register, Volume 36, Number 80, dated April 24, 1971, Part II. On Page 7799 the regulations go into the governing rules with respect to prescriptions. And, the Government would rely on the Section numbered 306.04. And, the two main sections or the two main parts of that section that apply to this case, that is, the specified theories of the Government's case, is section (a) which states in part: 'A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner, acting in the usual course of his professional practice.'

It is the Government's contention and theory that the conduct by Dr. Moore in giving out these prescriptions was not for a legitimate medical purpose, and secondly, that he was not acting in the usual course of his professional practice.

The second aspect of that regulation is part (c), which states in part: 'A prescription may not be issued for the dispensing of narcotic drugs to a drug addict for the purposes of continuing his dependence upon such drugs.'

It is the Government's contention that these prescriptions were issued to maintain these drug addicts as drug addicts, and that he was not issuing these prescriptions to detoxify them, but retaining them as drug addicts.

So, that really all boils down to the end result of what I stated, that he was conducting methadone maintenance or maintaining drug addicts rather than detoxifying them as he was only authorized to do by his regulations, and by his violation of these regulations he violated 841(a) of the CSA [Controlled Substances Act]." App. 35-37.

Thus, the basic theory of the prosecution was that, although Dr. Moore may have been an "authorized" person within the meaning of Section 841, "by his violation of these regulations he violated 841(a) of the CSA." App. 37.

A fatal flaw in this theory, however, is the fact that the Congress did not attach criminal penalties to Regulation 306.04. Regulations are authorized both by Section 821 and 871(b) of the statute.[12]

[12] § 821.

"The Attorney General is authorized to promulgate rules and regulations and to charge reasonable fees relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances."

§ 871(b).

"The Attorney General may promulgate and enforce any rules, regulations, and procedures which he may deem necessary and appropriate for the efficient execution of his functions under this subchapter."

But, while Congress conferred upon the Attorney General the power to promulgate regulations, it did not, in Section 841 or anywhere else in the statute, make violation of those regulations a crime. To the extent, therefore, that the conviction is said to rest on violations of Regulation 306.04, it cannot stand because, whatever administrative consequences may flow from such violations, no pronouncement of law has been violated to which Congress has attached any criminal penalty. *United States* v. *Eaton,* 144 U.S. 677 (1892); compare *United States* v. *Grimaud,* 220 U.S. 506 (1911); and see the dissenting opinion of Mr. Justice Frankfurter in *Singer* v. *United States,* 323 U.S. 338, 350-51 (1945). As this Court said in *Viereck* v. *United States,* 318 U.S. 236, 241 (1943):

> "One may be subjected to punishment for crime in the federal courts only for commission or omission of an act defined by statute, or by regulation having legislative authority, and then only if punishment is authorized by Congress."

Here, while the government can claim that the regulation has legislative authority, it cannot establish the second part of the proposition: that punishment for violating the regulation has been authorized by Congress.[13]

[13] The court of appeals did not reach this issue. 505 F.2d, at 430, fn. 14:

"We need not and do not decide whether § 306.04 of the regulations is sufficiently specific for the invocation of criminal sanctions, nor whether Congress intended that violations of regulations trigger criminal prosecutions under the Controlled substances Act."

Even if the Court could ignore the absence of any statutory nexus between the regulation violated and the penalty sought to be applied, it could not sustain application of the Section 841 penalty. Regulation 306.04 is included within Part 306 of the Regulation, the scope of which is stated in Section 306.01:

> "Rules governing the issuance, filling and filing of prescriptions pursuant to . . . (21 U.S.C. 829) are set forth generally in that section and specifically by the sections of this part."

Section 306.04 of the Regulations, therefore, whatever its provision may be taken to mean, is no more than a specification of the general provisions of Section 829 of the statute. Logically, there can be no penalty for violation of that regulation greater than the penalty prescribed for violation of the statutory provisions it implements. The penalty for violation of Section 829 is specified in Section 842, *not* Section 841, and it ranges between a mere civil money penalty and a maximum criminal penalty of one year imprisonment plus a fine. There is not even a statutory ambiguity suggesting that the government is free, by electing to prosecute the violation under Section 841, to multiply the maximum penalty for a violation of Section 829 by a factor of fifteen or thirty, as was done here. Moreover, even if there were some ambiguity as to which of the two penal sections—Section 841 or Section 842—applied to a violation of Section 829, that ambiguity would have to be resolved in favor of Section 842, because (1) it is the more specific statutory provision, *Bulova Watch Co.* v. *United States,* 365 U.S. 753, 758 (1961); *Fourco Glass Co.* v. *Transmirra Products Corp.,* 353 U.S. 222, 228-29 (1957); *Ginsburg & Sons* v. *Popkin,* 285 U.S. 204 (1932); and (2) it provides the lesser penalty. *Bell* v. *United States,* 349 U.S. 81, 83 (1955).

No Violation of the Regulation Was Proven.

The portions of Regulation 306.04 allegedly violated by Dr. Moore were specified by the prosecution, in its statement "in the nature of a Bill of Particulars," as subparagraphs (a) and (c). App. 36.

The language relied on from subparagraph (a) is:

> "A prescription for a controlled substance to be issued for a legitimate medical *purpose* by an individual practitioner acting in the usual course of his professional practice." *Id.* (Emphasis supplied.)

Under the government's own view of the evidence it introduced, Dr. Moore cannot be held to have violated the quoted portion of subparagraph (a). Taking, first, the latter part of the language, there can be no question that all the evidence proved that Dr. Moore was indeed acting in the usual course of *his* practice. What the Government's evidence proved in this regard was that what Dr. Moore did was *his* regular and constant practice; although it might not have been done in the usual course of the practice of *other* doctors. The regulation, however, speaks only of *his* practice. The clear intent of the language in question was not to dictate to a registered physician how he must employ narcotics in treating his patients, but merely to prevent him from using the device of a prescription to effect transfers of narcotics outside "the legitimate distribution chain," from registered pharmacists to unregistered drug pushers. The government cannot claim that Dr. Moore violated the regulation simply because it would have been unusual for other doctors, in the course of *their* practice, to have issued prescriptions for methadone in similar circumstances.

Turning, now, to the first part of the quoted language, requiring the prescription to have been issued "for a legitimate medical purpose," the government contended in the trial court that Dr. Moore prescribed methadone to his patients in quantities calculated to maintain them in their drug addiction and that the only legitimate purpose for which the law authorized prescription of methadone to patients was to detoxify them of drugs.[14] There is, however, nothing in subparagraph (a) of the regulation to show that maintenance of a drug-addicted patient on methadone is not a legitimate medical purpose [15] or that the only legitimate medical purpose is detoxification. Nor is such a distinction as to legitimacy suggested anywhere else either in the statute or in Regulation 306, with the exception of language quoted by the government from subparagraph (c) of Regulation 306.04, to which we now turn.

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[14] The court of appeals did not reach this issue. "We do not decide under what circumstances, if any, an individual such as appellant could lawfully administer a methadone maintenance program. Nor do we decide whether appellant was in fact maintaining addicts, detoxifying them, or simply pushing drugs." 505 F.2d, at 429.

[15] Although the administrative and other problems involved in a program of methadone maintenance are many and difficult, there can be little doubt that of all the techniques for drug-addiction treatment thus far developed by the medical profession, methadone maintenance is the most effective. See *New Perspectives on Urban Crime*, a report by the American Bar Association Special Committee on Crime Prevention and Control (1972), pp. 52-57. It would seem, therefore, that whatever imperfections there may have been in Dr. Moore's treatment of his patients, his undertaking to maintain them on methadone was at least a "legitimate medical purpose."

The language of Regulation 306.04(c) relied on below was:

> "A prescription may not be issued for the dispensing of narcotic drugs to a drug addict for the purpose of continuing his dependence upon such drugs." App. 36

Although the Assistant United States Attorney was frank to state to the court that he was reading only part of the subparagraph, what was not read was the most significant part, for it makes the regulation totally inapplicable to Dr. Moore. The omitted language, with a comma substituted for the period after "drugs," reads as follows:

> ". . . in the course of conducting an authorized clinical investigation in the development of a narcotic addict rehabilitation program."

The clear and obvious effect of subparagraph (c) is that registrants who have been authorized to conduct investigations for development of a program for rehabilitation of addicts may engage in methadone maintenance but only by on-the-spot administration of the drug. Presumably, dispensing the drug by prescription is deemed undesirable in such circumstances. It is equally clear that the subparagraph can have no possible application to the individual medical practioner who is clearly authorized to employ prescriptions generally (see Regulation 306.03) and who does so for a therapeutic, not investigative, purpose.

The Harrison Narcotic Act Cases

The government, in its brief in this Court, relies on a line of cases under the Harrison Narcotic Act of 1914, 26 U.S.C. § 4701 *et seq,* to sustain the conviction in this case. The cases under that Act are not dispositive.

As the court of appeals observed, the Controlled Substances Act is fundamentally different from the Harrison Narcotic Act. 505 F.2d, at 431. The legislative history indicates that the Controlled Substances Act replaced the Harrison Narcotic Act single penalty provision with a series of penalty provisions specifically designed to treat registered and unregistered indivduals differently. *Id;* and see fn. 10, *supra;* see also *United States* v. *Rosenberg,* — F.2d —, No. 74-2197 (9th Cir. 1975), Sl. op. 23, *et seq* (Ely, J., dissenting).

The House version of the Act was passed in lieu of the Senate bill. The accompanying House Report *expressly* highlighted the need for new legislation in light of the Harrison Act's inadequacies. H. Rep. No. 91-1444, 91st Cong., 2d Sess., U.S. Code Cong. and Adm. News (1970), pp. 4580-81. The Report explicitly referred to this Court's own acknowledgment that the earlier Act was passed without consideration of the addiction problem. The Court had observed in *Linder* v. *United States,* 268 U.S. 5, 18 (1925), that the "declared object" of the Harrison Act was to provide revenue and that it:

> "says nothing of 'addicts' and does not undertake to prescribe methods for their treatment."

The House Report underscored that inadequacy. It acknowledged the observation that "[o]ut of a fear of prosecution many physicians refuse to use narcotics in the treatment of addicts . . . ," and went on to propose that the new legislation authorize new guidelines which would minimize the inhibitions that Harrison Act prosecutions had generated.

> "Although the committee is concerned about the appropriateness of having Federal officials determine the appropriate method of the practice of medicine, it is necessary to recognize that for the last 50 years this is precisely what has happened, through criminal prosecutions of physicians whose methods of prescribing narcotic drugs have not conformed to the opinions of Federal prosecutors of what constitutes appropriate methods of professional practice. U.S. Code Cong. and Adm. News, p. 4581."

It was one of the principal objects of the Controlled Substances Act to clarify for physicans "the extent to which they may safely go in treating narcotic addicts as patients." *Id.,* at 4580. Such a legislative object is fully appropriate in light of modern hypotheses as to addiction treatment. These hypotheses now respectably include, as they did not in the Harrison Narcotic Act era, the use of narcotics themselves for curative, as distinguished from mere comforting, purposes. This development was relatively unknown in the 1920's when the leading cases under the Harrison Narcotic Act were decided.[16] And it calls for an expanded concept of medical addiction practice under new kinds of controls.

Indeed, the legislative history of the Controlled Substances Act considered this very problem. Quoting at length from both the Prettyman Commission of 1963[17] and the Katzenbach Commission of 1967,[18] the House Report noted:

> "Since the passage of the Harrison Act of 1914, the Federal narcotics laws have expressly per-

[16] *Jin Fuey Moy* v. *United States,* 254 U.S. 189 (1920); *United States* v. *Behrman,* 258 U.S. 280 (1921).

[17] The President's Advisory Commission on Narcotics and Drug Abuse.

[18] The President's Commission on Law Enforcement and Administration of Justice.

mitted a physician to prescribe narcotic drugs for a patient in the course of 'professional practice only' and for 'legitimate medical uses' and 'legitimate medical purposes.' Under this statutory language there is no doubt that a physician may prescribe narcotic drugs for a patient suffering acute pain or from a painful and incurable disease. But a controversy has existed for 50 years over the extent to which narcotic drugs may be administered to an addict solely because he is an addict.

"During the first 10 years following enactment of the Harrison Act, the Supreme Court affirmed several convictions under the act involving the indiscriminate prescribing of narcotic drugs for addicts. In 1925, however, in *Linder* v. *United States,* 268 U.S. 5, 45 S.Ct. 446, 69 L.Ed. 819, the Court indicates that the dispensing of narcotic drugs by a physician for the purpose of relieving conditions incident to addiction was not in every instance a violation of the act. . . .

"The regulations of the Bureau of Narcotics, however, do not seem to be in accord with [Linder] . . .

"The practicing physician has thus been confused as to when he may prescribe narcotic drugs for an addict. Out of a fear of prosecution many physicians refuse to use narcotics in the treatment of addicts except occasionally in a withdrawal regimen lasting no longer than a few weeks. In most instances they shun addicts as patients." H. Rept. No. 91-1444, U.S. Code Cong. and Adm. News (1970), at p. 4580.

The Controlled Substances Act responded to these needs with the concept of a "legitimate distribution chain" whose abuses would be policed primarily by administrative rather than criminal sanctions. That

concept lies behind the carefully drawn categories which distinguish Section 841 control from measures authorized in Section 842 and 843. Precedents drawn from an earlier regime, under a statute not addressed to the addiction problem, can hardly be taken as dispositive of the issues raised under the new statutory categories. To do so is to emasculate the point of the enactment.

The Cases from Other Circuits

The government's brief notes, Pet. Br., p. 44, that the court below stands alone in having held that the felony provisions of Section 841 are inapplicable to a licensed physician registered with BNDD. *United States* v. *Badia,* 490 F.2d 296 (1st Cir. 1973); *United States* v. *Collier,* 478 F.2d 268 (5th Cir. 1973); *United States* v. *Leigh,* 487 F.2d 206 (5th Cir. 1973); *United States* v. *Bartee,* 479 F.2d 484 (10th Cir. 1973); *United States* v. *Jobe,* 487 F.2d 268 (10th Cir. 1973); *United States* v. *Larson,* 407 F.2d 385 (9th Cir 1974); *United States* v. *Green,* 511 F.2d 1062 (7th Cir. 1975); *United States* v. *Rosenberg,* —— F.2d ——, No. 74-2197 (9th Cir. 1975). One cannot, however, simply enumerate these cases and conclude from that enumeration that the opinion of the court below is an aberration that stands athwart the judicial mainstream.

One must, first of all, distinguish between the pre-*Moore* cases and the post-*Moore* cases. Of the cases enumerated in the preceding paragraph, only *Green* and *Rosenberg* are post-*Moore* cases.

Turning to the pre-*Moore* cases, it is at once apparent that none appear even to have considered the legislative history of the Controlled Substances Act. Nor, indeed, do they appear to have considered the

precise argument made in and adopted by the court below. This point was most cogently made in the most recent of the post-*Moore* cases in which the prevailing opinion noted:

> "Apparently only Dr. Moore has thought that section 841 did not apply to registered doctors. This argument is not among the many arguments made by Dr. Rosenberg [the appellant], and its does not seem to have been made before any other court, ... *United States* v. *Rosenberg,* F.2d , No. 74-2197 (9th Cir. 1975), Sl. op. 9, fn. 9.

This statement in *Rosenberg* is accurate. The reasoning in *Bartee* rested upon an agreement of the parties. 479 F.2d, at 488. Moreover, there is no suggestion in the *Bartee* opinion that the physician there involved was registered with BNDD. Two other pre-*Moore* cases, *Leigh* and *Jobe,* rely solely upon *Bartee* and contain no independent analyses. 487 F.2d, at 269; 487 F.2d, at 207.

The only argument made in *Collier* was as to "the constitutionality of 21 U.S.C. § 841(a)(1) as applied to physicians." 478 F.2d, at 270. While *Badia* does appear to address the question which is here involved, 290 F.2d, at 297, there is no analysis of the legislative history in the opinion and it does not appear to have been presented to the court. Finally, *Larson,* too, relies solely upon *Bartee,* 507 F.2d, at 387 *et seq.,* does not reflect that the physician there involved held a BNDD registration and, perhaps most importantly, has recently lost one judicial adherent. Judge Ely, who participated in the *Larson* affirmance, dissented in *United States* v. *Rosenberg,* F.2d , No. 74-2197 (9th Cir. 1975), and wrote:

> "I was a member of the panel of this Court that decided *Larson,* wherein we unanimously affirmed the section 841 conviction of a licensed physician on facts similar to those presented here. Because of the more searching inquiry prompted by the briefs and arguments in this case and by the decision in *Moore,* I am now convinced that our decision in *Larson* was wrong. I regret, of course, that I cannot now undo my judicial mistake in respect to *Larson.*" Sl. op., 21, fn. 7.

The post-*Moore* cases of *Green* and *Rosenberg* are the only ones thoroughly to consider the statutory analysis made in *Moore.* The convictions in *Green* and *Rosenberg* were affirmed with Judge Ely dissenting in *Rosenberg.* With all due respect to the judges in the *Rosenberg* majority, Dr. Rosenberg simply did not argue that "section 841 did not apply to registered doctors. This argument is not among the many arguments made by Dr. Rosenberg, . . . " *Id.,* sl. op. 9, fn. 9. He argued the unconstitutionality of the statute, the violation of his right against self-incrimination and the sufficiency of the evidence *Id.,* sl. op. 1-2. And in *Green,* even though affirming the conviction, the court "agree[d] with the *Moore* majority that Congress in some respects intended to treat physician-registrants differently from non-registrants." 511 F.2d, at 1067. The *Green* court did not "agree however, that registrants were to be totally immune from the sanctions imposed by section 841." *Id.* To the extent that *Green* and *Rosenberg* considered the statutory analysis here made, and adopted by the court below, the Respondent respectfully submits that those courts erred in their conclusion. "[W]hen a choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States* v. *Universal*

C.I.T. Credit Corp., 344 U.S. 218, 221-222 (1952). This is the test applied by the court below to a complex statutory scheme.[19] The Respondent submits that the court of appeals was correct in its analysis of the statute and of its legislative history.

CONCLUSION

It is, therefore, respectfully submitted that the judgment of the court of appeals should be affirmed. Alternatively, should this Court disagree with the statutory analysis contained in the prevailing opinion of the court below, the case must be remanded for consideration by that court of issues which it did not reach —including, *inter alia,* the propriety of the doubled sentences and the consecutive nature thereof (see fn. 8, *supra*), the adequacy of the trial court's instructions and those points noted in fn. 13 and 14, both *supra.*

EDWARD BENNETT WILLIAMS

HAROLD UNGAR

RAYMOND W. BERGAN

Counsel for Respondent

July 1975

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[19] The confusing nature of the statutory scheme is perhaps best revealed by a footnote in *United States* v. *Badia,* 490 F.2d, at 298, fn. 4:

> "We acknowledge that this interpretation of the statutory scheme conflicts with the recent decision of the Fifth Circuit in United States v. Leigh, 487 F.2d 206 (5th Cir. 1973) . . . . It should also be noted that *Leigh* seemingly conflicts with the prior Fifth Circuit decision in *Collier, supra,* . . ."

And see *United States* v. *Jobe,* 487 F.2d, at 269 ("The statute is not a model of clarity in this respect, . . .".).